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ABSTRACT

This report presents the basic components of a "prima facie" antitrust case against the Oregon State System of Higher Education. It deals with the constitutional issues raised as well as showing that higher education is interstate commerce within the meaning of the antitrust laws. The report analyzes the state exemption to antitrust laws and concludes that recent decisions have limited this exemption to such an extent that the State System would be held to be within the scope of the antitrust laws. Under the Sherman Act the most difficult parts of the prima facie case are proof of conspiracy and market definition. In a Clayton Act prosecution the most difficult task is to show that higher education is a commodity and that the State Board of Higher Education is a person, although showing the substantive acts of tying and price discrimination is easy. The Federal Trade Commission Act is the most promising for attacking the present State System because the act is supposed to deal with cases where substantive actions are clear but technicalities prevent prosecution under other acts. Research indicates that although an antitrust suit against the State System would certainly be called a long shot, it is indeed feasible and has a firm foundation in case law. (Author/MJM)

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Antitrust and the Control of Higher Education

U.S. DEPARTMENT OF HEALTH
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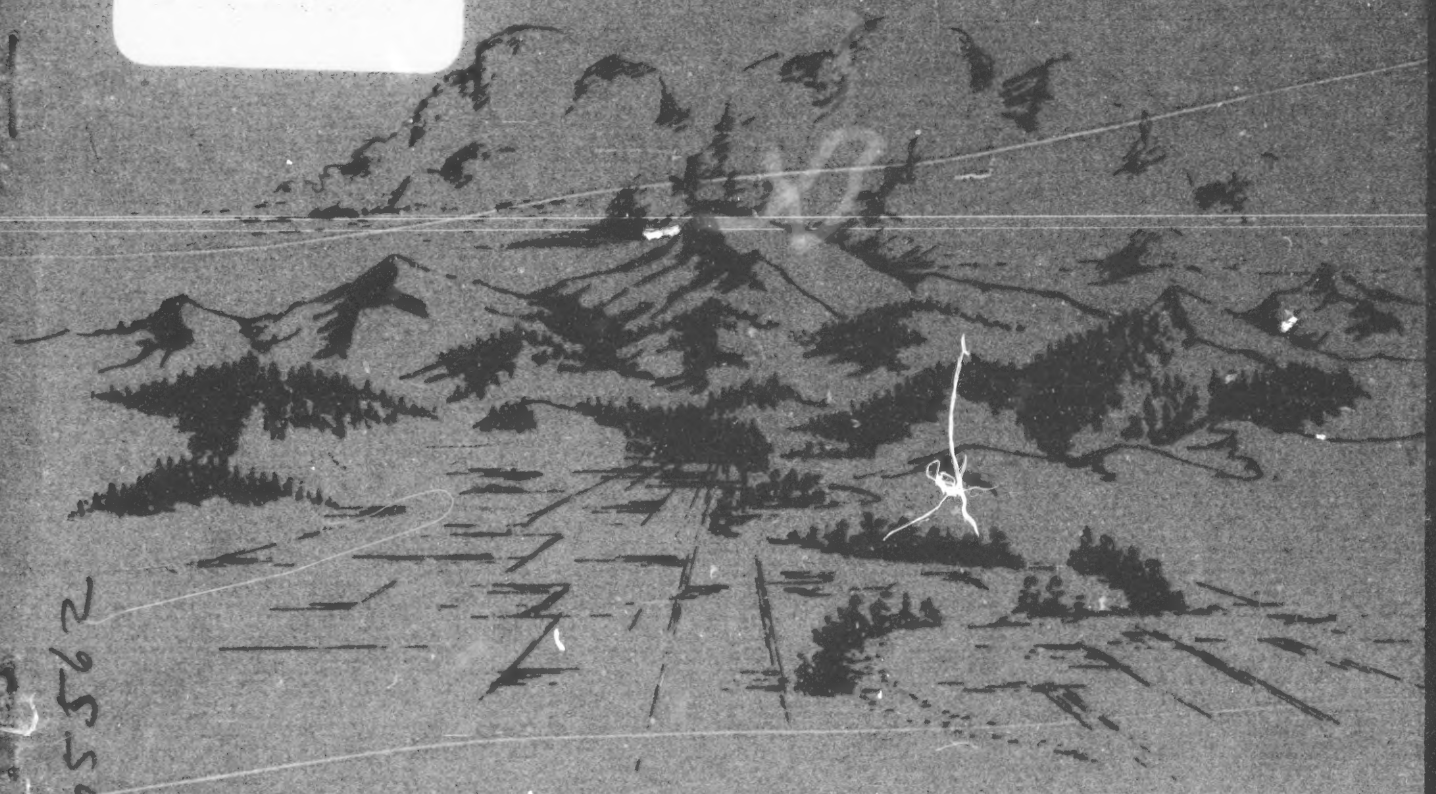
by
Greg Hartman



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Urban Studies Center,
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ANTITRUST AND THE CONTROL OF HIGHER EDUCATION

by

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September, 1972

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I. Abstract

This report presents the basic components of a prima facia antitrust case against the Oregon State System of Higher Education. It deals with the constitutional issues raised as well as showing that higher education is interstate commerce within the meaning of the antitrust laws. The report analyzes the state exemption to antitrust laws and concludes that recent decisions have limited this exemption to such an extent that the State System would be held to be within the scope of the antitrust laws. Under the Sherman Act the most difficult parts of the prima facie case are proof of conspiracy and market definition. It is shown that the State System is engaging in several actions which are substantive violations of the Sherman Act, including price fixing, tying, market sharing, and selling below cost. In a Clayton Act prosecution the most difficult task is to show that higher education is a commodity and that the State Board of Higher Education is a person, although showing the substantive acts of tying and price discrimination is easy. The Federal Trade Commission Act is the most promising for attacking the present State System because the act is supposed to deal with cases where substantive actions are clear but technicalities prevent prosecution under other acts. Unlike the other antitrust acts, private suits can not be brought under the Federal Trade Commission Act but must be brought before the Federal Trade Commission. The Commission only has to accept a suit if it finds that it is in the public interest. Research indicates that although an antitrust suit against the State System would certainly be called a long shot, it is indeed feasible and has a firm foundation in case law. It is hoped that this paper will succeed in transfering the discussion of antitrust and higher education from legal technicalities to the divergent policies of antitrust and higher education.

II. Preface

The author has just begun his second year of studies at the University of Oregon Law School, where he enrolled after receiving a B. A. in Math from the University of Chicago. This paper is the result of twelve weeks of research undertaken while employed as a WICHE (Western Interstate Commission of Higher Education) intern during the summer of 1972. The internship was sponsored by the University of Oregon's Consumer Rights Research Center (CRRC) and was funded by a grant received from the Center to study the marketing and funding of Higher Education.

Previous studies done by CRRC have revealed some of the anti-competitive effects of the present system of funding higher education in Oregon and the question of the relevance of the antitrust laws has arisen. The purpose of this project is to assess the feasibility of an antitrust suit against the Oregon State System of Higher Education and to prepare a report which discusses the relevant legal complexities. This report is intended to supplement the research being done by CRRC consequently no economic analysis is presented.

III. Introduction

During the past several years education in America has received a large measure of publicity, often due to the turmoil evident on college campuses throughout the country. As this turmoil has subsided attention has been given to other aspects of education; one of the areas given increasing scrutiny is the funding of education. Many have become concerned about the upward spiraling of property taxes to support elementary and secondary education as well as the state and federal taxes used to support higher education. This concern has led to an analysis of the situation which suggests that the higher education industry can be studied using models similar to those used to study other industries. This line of argument that the higher education industry responds to the same economic rules as other industries leads one to question why the higher education industry should not also play by the same legal rules. In particular, why shouldn't the higher education industry be subject to federal antitrust laws? This paper will analyze the higher education industry in Oregon in terms of the federal antitrust laws.

The first four sections of the paper deal with threshold questions which are common to all three of the antitrust acts. In these sections the constitutional issues are examined, education as interstate commerce is analyzed, and the question of the acope of the state exemption to antitrust laws is studied. The next major section deals with both parts of the Sherman Act, analyzing such State System actions as price fixing, tying, market sharing, and selling below cost. The next section considers tying and price discrimination and the basic elements of an action under the Clayton Act. The section on the Federal Trade Commission Act examines both the broad acope and limitations under the final antitrust act.

This paper can be likened to a preliminary brief on the subject of antitrust and higher education. An attempt has been made to present a prima facie case against the Oregon State System of Higher Education (hereinafter the State System) and to highlight the legal complexities of an antitrust case against the State System. This paper should not be viewed as the first step in the preperation of a court case against the State System but rather as an argument to be used in conjunction with economic analysis of the State System to prompt legislative action. Antitrust law is based on a firm foundation of belief in the advantages of a competitive market situation and if it can be shown that the State System is in violation of the substantive antitrust law, this system will be operating in conflict with those policies. If this conflict cannot be resolved, the antitrust laws will prevail and the State System should be changed.[1] In addition, it should be noted that the Oregon legislature has passed antitrust laws declaring such things as price discrimination and selling below cost to be illegal,[2] apparently without realizing the conflict between these laws and the State System.[3]

These conflicts between federal antitrust law and the funding of the State System must either be justified or resolved through legislative change. It is clear that the state could not set up a monopoly directly by driving out all of the private colleges; an attempt to do that in elementary and secondary education in Oregon was declared to be in violation of the first amendment.[4] If the state can not create a monopoly directly then it should be restrained from doing so indirectly.

IV. Threshold Issues

Constitutional

One issue which will immediately be raised when the possiblility of an antitrust suit against the State System is suggested is the State's Constitutional right to set up a higher education system without interference from the federal government; however, this should prove to be no great obstacle. The Supreme Court has said, "The power of Congress in the commerce field is broad and sweeping and where it keeps within its sphere and violates no express constitutional limitation, the Supreme Court will not interfere."[5] Although there is some governmental immunity to the power of the federal government to tax,[6] it has long been recognized that public schools are subject to taxation.[7] Congress has always been able to exercise its power under the commerce clause to suspend state laws which interfere with its purpose.[8] The sovereign power of the states is necessarily diminished by the extent of the grants of power to the Federal government in the Constitution.[9] The Supreme Court has recognized that public school systems come within Congress' power to regulate commerce.[10]

State Exemption

The most important defense to any antitrust action against the State System will be that the state does not come within the scope of the antitrust laws. In the landmark case of Parker v. Brown[11] the Supreme Court held that activities of state governments were not within the prohibitions of the Sherman Act. The scheme under review in the Parker case had been set up by the California legislature to control the production and distribution of raisins. The purpose of this scheme was to "conserve the agricultural wealth of the State" and to "prevent economic waste in the marketing of agricultural crops"[12] of the state. The Court assumed for the purposes of the opinion that the scheme would have been illegal if undertaken privately and so based its opinion squarely on the State's exemption from the Sherman Act. The Court stated that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[13] The Court immediately placed limits on

this state exemption by noting that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[14] The Court also pointed out that the question of a state joining in a private agreement or combination by others for restraint of trade was not at issue in the case.[15]

The result of the Parker case has been questioned by frequent litigation which has served to further restrict the state exemption. In a number of cases involving tobacco boards of trade set up by statute but staffed by local growers the emphasis was on the reasonableness of the conduct rather than the state exemption and some of these boards of trade were found to be violating the antitrust laws.[16] In the insurance field a North Carolina scheme for regulating insurance was found to be indistinguishable from the Parker case and so exempt from antitrust regulation.[17] In three cases the courts have examined the question of public officials participation in conspiracies to restrain trade and only one found liability.[18] The other two cases, however, are not strong precedents since one involved a situation in which the Federal Aviation Administration had partial jurisdiction,[19] and in the other case the public official's only action was to switch an already existing monopoly from the hands of the plaintiff to the defendant.[20] The courts have now realized that the emphasis of the Parker Court on the extent of the state involvement "precludes the facile conclusion that action by any public official automatically confers exemption."[21]

Several tests have evolved for determining the extent of the state exemption to antitrust law. The simplest of these examines the amount of state participation in the situation under question and if there is a large amount of state control there is immunity.[22] The second test goes much further and examines the policy behind the state action under question. The court in Whitten v. Paddock stated that "valid government action confers antitrust immunity only when government determines that competition is not the summun bonum in a particular field and deliberately attempts to provide an alternate form of public regulation."[23] In the Whitten case the court divided antitrust cases in which the state was involved into three categories. In the first category, which includes the Parker case, the state had deliberately occupied the field to enforce an anticompetitive policy.[24] The court points out that a state policy of encouraging price stability is not enough to confer an exemption from antitrust laws; the state must actually delegate the power to set prices and have some method for reviewing these prices.[25] The middle category is occupied by cases in which the state has chosen to regulate an industry but where the state has remained neutral with respect to restraints of trade. In these cases the courts have denied immunity.[26] In the third category in which the Whitten case falls the state has espoused an openly competitive policy and no immunity is found. The final

test for deciding the question of state immunity examines not only the state policy behind the actions in question but the federal policy behind the antitrust laws and any other relevant statute as well. If both federal and state statutes are found to cover the same field and the laws have the same purpose, they are reconciled and allowed to coexist; if the laws reveal different purposes, the state law falls.[27] An attempt is made to render both state regulatory and federal antitrust goals complementary rather than mutually exclusive.[28] Reasoning along these lines the court in Hecht v. Pro-Football, Inc.[29] pointed out that the immunity to antitrust laws granted in the Parker case was really a result of the similar goals of the state action in question and the federal Agricultural Adjustment Act. The exemption was created not by state action but by Congress itself when it passed the Agricultural Adjustment Act.[30]

The Supreme Court has not yet resolved the differences between these tests of state immunity to the antitrust laws; consequently any of them might be the proper one to resolve the question of immunity for the State System. To attempt to resolve these three tests in this paper would require a great deal of time and ink and the result of this process certainly could not be regarded as the ultimate test. An easier approach is simply to examine the State System in light of the three tests. Using the first purely quantitative test it is clear that the State System would be granted immunity since the state not only regulates the State System but it also completely controls and provides most of the financing for the State System. Using the second test the State System clearly would not be granted immunity since the state has never "determined that competition is not the summun bonum" in the field of education. Using the third test and keeping in mind that the purpose of an act is determined not only by legislative declarations but by the effects of a statute as well[31] it is clear that if the State System has anti-competitive effects then its purpose is in conflict with the purpose of the antitrust laws and no immunity will be granted. Only the first of the three tests would grant immunity to the State System and the two cases on which this test is based are shaky precedents. In the Travelers case the court rested its decision partly on the fact that the defendant "had not been extended valid governmental authority to engage in monopolistic practices" which seems to place this case in the middle category of the second test. In the Norman's case the court pointed out that the McGuire Act was not applicable to the Virgin Islands since it did not have full legislative power and there is a great deal of policy analysis undertaken resembling that necessary for the third test. The first test, the purely quantitative one, is the only test which would grant the State System immunity and it has just been shown that that test is not based on strong precedents.

Commerce

Another question which will immediately be raised in an antitrust suit against the State System is that education is not commerce within the meaning of the antitrust laws. There is no express statutory exemption for professional activities but for many years these activities enjoyed immunity from antitrust since they were not considered to come within the meaning of commerce.[32] But the commerce category has been expanded so that it now includes medicine, insurance, and drama.[33] In the only antitrust case which considered the question of education as commerce the District Court gave a lengthy consideration to non-commercial activities as commerce, concluding that education is indeed commerce.[34] The court stated:

> The myriad financial considerations involved in building programs, teacher's salaries, tuitions and miscellaneous operating expenses attest to the commercialization which necessarily exists in the field of higher education. Despite the opposition of many educators, there has been a recent trend toward the organization of faculty members to bargain collectively for better salaries and other benefits. Many institutions rent dormitory rooms and operate dining halls, book stores and other service facilities. Also there is a commercial aspect to the sharp competition for government and private contracts and the quest for research grants. In 1967-68 institutions of higher education expended more than 17 billion dollars. The projection for the year 1976-77 is 41 billion. Higher education in America today possesses many of the attributes of business. To hold otherwise would ignore the obvious and challenge reality.[35]

The Appeals court overuled the lower court and dismissed the case on the grounds that higher education was not commerce in this context. The court stated:

> In this context, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws.[36]

The court did not find the case compelling; they simply did not decide the more difficult issue, whether education is commerce. This is illustrated by the court when it says "It is possible to conceive of restrictions on elegibility for accreditation that could

have little other than a commercial motive; and as such, antitrust would presumably be applicable."[37] It is clear that the state system does affect the commercial aspects of the profession; consequently the above case does not provide a clear precedent. It is also clear that the State System is operated for other than commercial purposes which takes this case outside of the dictum noted above. This case provides little help in determining whether higher education is commerce.

There are two things which can assist in deciding whether education is commerce. First is the fact that the general language of the antitrust acts was designed by Congress to exercise its power under the commerce clause of the Constitution to the fullest extent possible.[38] Since regulating education is within Congress' commerce powers[39] it seems that a court would easily find that education is commerce within the meaning of the antitrust laws. The second fact which must be noted is that depending on the plaintiff the question of education as inter-state commerce may never arise. When deciding whether commerce is being restrained it is proper to look at the trade which the plaintiff claims is being restrained.[40] Consequently if the plaintiff is a doctor complaining about the State System practice of tying medical services to education, the relevant question is whether medical services are commerce. If the plaintiff is a private school operated for profit in Oregon, the trade of the plaintiff would have to constitute commerce for a suit to be successful. If the plaintiff is an independent, four year, non church related, college then once again it is the plaintiff's trade which must constitute commerce in order for a successful suit.

Interstate

The last problem which spans all of the antitrust acts is whether the State System is engaged in interstate commerce. Once again the question may be resolved depending on who the plaintiff happens to be. Leaving that question aside it is still easy to see that the State System is engaged in interstate commerce. Interstate commerce has been defined as "every negotiation and dealing between citizens of different states which contemplates and causes and importation into one state from another, whether it be goods or information."[41] Another definition of interstate commerce points out that commerce is not confined to business activity in a conventional sense but includes non business and non-profit activities, whether private or governmental in nature and irrespective of whether they compete with or may be substituted for by private enterprise."[42] Both the Sherman Act and the Federal Trade Commission Act take a more expansive view of the requirement that the conduct under consideration be interstate commerce than does the Clayton Act. The Sherman Act and the Federal Trade Commission Act both apply to activities which have a substantial effect on interstate commerce

even though they are completely intrastate.[43] The Clayton Act holds to a more stringent test requiring the activities themselves to be in interstate commerce.[44] The courts have held that the "operation of public schools and hospitals by the several states and their subdivisions affect interstate commerce to substantial degree whether or not such operations constitute interstate commerce."[45] Although it seems clear from the definitions given above that the State System is engaged in interstate commerce this question may pose some difficulties in Clayton Act prosecutions.

V. The Sherman Act

Section I. In general this section states that any contract, combination, or conspiracy in restraint of interstate trade or commerce is illegal. There are four main issues which arise under Section I of the Sherman Act.[46]

1) What proof suffices to show a contract, combination or conspiracy?
2) Does the conduct reviewed sufficiently affect interstate trade or commerce?
3) What is the relevant market and what evidence is sufficient to establish that market?
4) In that market does the conduct challenged unduly restrain competition?

1) Contract, Combination or Conspiracy

In order to find liability under Section 1 of the Sherman Act there must be some concert of action between two parties in the form of a contract, combination, or conspiracy.[47] An individual may restrain interstate commerce without coming within the inhibition of Section 1 of the Sherman Act.[48] In order to bring the State System under Section 1 of the Sherman Act some plurality of action must be found. The State System is composed of several highly autonomous schools which are in competition with each other and with other schools outside of the system. This system is run by the State Board of Higher Education (hereinafter the State Board) whose members are appointed by the governor. Thus the system is somewhat analogous to a centralized corporation with the revenue and costs appropriated by a central headquarters.

The question which immediately arises when considering the State System is whether it is to be considered as several firms who have combined certain management decisions or whether the system is to be considered as one firm with several subsidiaries. If the former is the case then a combination or conspiracy is the obvious form of the system. By combining management decisions in one body the State System by definition would have formed a combination or conspiracy.[49] If the courts find that the State System is actually only one firm with several subsidiaries then proof of conspiracy or

combination becomes more difficult. In a recent case, the Supreme Court found that the defendants had set up their central licensing arrangement for the purpose of effecting a market division scheme and the Court declared this to be a violation of Section 1 of the Sherman Act.[50] The two most important factors which the courts use when deciding whether an enterprise is beyond the scope of Section 1 of the Sherman Act because it is only one firm and cannot conspire with itself are the degree of autonomy (or conversely the lack of control) of one corporate relative to another, and the extent to which corporate relatives are held out as competitors.[51] The Supreme Court has noted that the rule that "common ownership and control does not liberate corporations from the impact of the antitrust laws" is especially applicable where affiliated corporations "hold themselves out as competitors."[52] The Attorney General's Report points out that the substance of the Supreme Court cases is that "concerted action between a parent and a subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1."[53] Recent cases dealing with this question have generally favored the single trader concept and have refused to find liability but immunity is not guaranteed.[54] The Supreme Court recently has narrowed the scope of the single trader concept by holding that common ownership of corporate members in an enterprise where the corporations were operating separately "would not save them from any of the obligations that the law imposes on separate entities."[55] However, the Ninth Circuit Court of Appeals recently held that unincorporated divisions of a single corporation cannot conspire in violation of Section 1 of the Sherman Act.[56] Although the structure of the State System is different from the structure of the conspiracies found in the cases above it is clear that a court could find that the State Board was a conspiracy.

2) Interstate Trade or Commerce

This issue has already been dealt with and it is sufficient to note here that commercial service activities of any kind will constitute trade or commerce[57] and only those activities are beyond the reach of the Sherman Act which are purely local in the double sense that they (1) are not within the flow of interstate commerce and (2) have no significant effect on that flow.[58]

3) Market

The relevant market has two aspects--geographical and product participation. The product being supplied by the State System is undergraduate education and the market certainly includes undergraduation education provided by private schools. Defining the geographical limits of the market is more difficult. The State System draws student from all over the world and graduates of that system travel to all parts of the world; however, it would be

meaningless to speak of the world or even the U. S. as the relevant market. Finding the relevant market is considered a question of fact[59] and in order to determine the geographical bounds of the market the courts have suggested examining the patterns of trade which are followed in practice,[60] the area of effective competition within which the defendant operates[61] or the area in which the defendant and plaintiff are in competition.[62] In another case the court limited the market to the area where the defendant had been making his greatest efforts to become the sole supplier of replacement parts.[63] The question of the relevant market area is one in which common sense and the rule of reason play a large part. Although the State System draws students from all over the world, it draws over 90% of its students from the State of Oregon. Also, over 90% of the Oregon high school seniors who go to college stay in the State of Oregon and of the full time equivalent twelve student hours taught in Oregon's four year colleges, 85.5% are taught in the State System. The State System draws its second largest block of students from California but to consider the State of California as part of the relevant market would be to ignore reality. The average Oregon high school senior has little chance of attending a California school not only because of high admission standards but also because of high out-of-state tuition--if there is any competition on the undergraduate level it is only for the intellectual and financial elite.

A further argument which indicates that Oregon is the relevant market is that by setting up out-of-state tuition rates all over the country the State Systems have effected a market sharing arrangement. Although it might be impossible to attack this arrangement directly because of the Constitutional issues involved it can be argued that the State System be stopped from claiming that the relevant market be anything other than the State of Oregon. By setting up these out-of-state tuition rates the market has already been defined and since the State System has achieved such a measure of control over the Oregon market they should not be allowed to argue that the area of effective competition is any larger. Also it must be kept in mind that the relevant market might be influenced by the plaintiff in a case against the State System. If the suit were brought by a private college in Oregon which drew most of its students from Oregon then the area of competition would be Oregon which would then be the relevant market.[64] The average high school senior in Oregon who wishes to attend a four year college must choose between the State System and other schools in the country with tuition rates three or four times higher. Viewed from that perspective it seems reasonable to say that the relevant market is Oregon.

4) Undue Restraint of Competition

The usual method of demonstrating undue restraint of trade is to examine the effect of the defendant's conduct in the market which has

already been defined to see if that conduct unduly restrains trade. The courts usually look to the reasonableness of the conduct and determine (1) whether the defendant has enough market power to make the restriction an undue restraint of trade and (2) whether the defendant actually exercises the power or intends to do so.[65] The State System sells its product at about 1/3 of the cost to produce it. The effects of this pricing structure on the Oregon market has already been examined and the conclusion is clear--the private colleges are being driven out of the market.[66] (Since this report is to be used in conjunction with an in-depth economic analysis of the State System, very little economic analysis is given here.) The State System does have and is using its power to exercise a high degree of restraint on the trade or commerce in the Oregon market.

There are some actions which the courts consider so likely to cause an undue restraint of trade that when one of those actions is proven there is a conclusive presumption that there has been an undue restraint of trade. The courts allow no evidence to be introduced which would tend to prove that there had been no undue restraint of trade or commerce. These offenses are called per se offenses and the most common is price fixing.[67] Price fixing includes not only the establishment of uniform prices but an agreement upon a range within which purchases or sales will be made as well; prices paid or charged are fixed if they are to be at a certain level, or on ascending or descending scales, or if by various formula they are related to the market prices.[68] Since the State Board sets all tuition levels in the State System it is clearly engaging in price fixing. The only evidence which can be introduced to defend a charge of price fixing is that prices were not fixed; the courts will not allow evidence of good faith or purpose since "a price fixing combination is not saved from sections 1-7 (Sherman Act) of this title by the high purpose for which it is conceived."[69] Also the courts will not allow evidence that the price fixed is reasonable since the essence of the offense is in the power to set prices not the particular price set.[70]

The State System also engages in tying or bundling which is a per se violation of Section 1 of the Sherman Act. Tying is defined as a scheme which forces a customer to take a product he does not want in order to secure one he desires.[71] By forcing students to pay fees for medical services, athletic services, and other student activities the State System is tying these products to its main product--education. This is a per se offense but it must also be shown that the State System has a high degree of power over the tying product which is education.[72] Since the amount of power the State System has approaches monopoly proportions and will be discussed elsewhere it will not be pursued here. The State System has more than enough power to make the tying which the State System practices a per se offense.

It was mentioned earlier that the institution of out-of-state tuition has effected a sort of market sharing arrangement among the public systems of higher education in this country. Market sharing arrangements are illegal under Section 1 of the Sherman Act,[73] but this problem is not discussed here because of the other difficulties which would be encountered, including proof of a conspiracy between all of the state systems of higher education in the country, involving important state's rights questions. It is a problem worth pursuing but it is beyond the scope of this paper.

Section II. Section II of the Sherman Act has three substantive offenses which are separate from those covered under Section I. They are:[74]

1) to monopolize
2) to attempt to monopolize
3) to combine or conspire with any other persons to monopolize any part of the trade or commerce among the several states, or with foreign nations.

1) Monopolization

The offense of monopolization under section 2 of the Sherman Act has two elements, (1) possession of monopoly power (2) and the willful acquisition or maintenance of that power.[75] In order to establish the monopoly power of a firm a relevant market must be established both by the product and by geographical area.[76] The problem of market definition has already been dealt with in section 1; it will be assumed here that the relevant market is the state of Oregon. The basic criteria for determining whether a firm has monopoly power is to examine its power to affect prices.[77] The State System does have this power as it sets tuition levels at about 1/3 of the cost of providing the service. The single most important criteria for deciding whether a monopoly exists is whether a firm has a large share of the market, although the courts have not yet established a *prima facie* rule for monopolization cases under section 2 of the Sherman Act as they have done under section 7 of the Clayton Act. In the Cellophane case the court indicated that had the market been limited to cellophane, the defendant's control of 75% of that market would have constituted monopoly power. In two other cases the Supreme Court found that 81% of the market[80] and 87% of the market were enough.[81] The *Grinnell* case went one step further at the District Court level by saying that when the defendant's dominant share of the market had been established, the burden of disproving monopoly shifts to the defendant.[82] The Supreme Court did not endorse the view since it found liability on more traditional grounds so no *prima facie* rule has been established. As was mentioned earlier the State System provides 85.58% of the full time equivalent hours in the state of Oregon in four year colleges and there is no doubt that the State System has monopoly power in the Oregon market. It

might also be argued along the lines of the Grinnell case that the high share of the market should constitute a prima facie case of monopolization.

The second element of a case of monopolization is proof that the monopoly power has been willfully obtained or maintained. Monopoly power itself is not an offense under Section 2 of the Sherman Act; it must be coupled with the purpose or intent of acquiring or maintaining that monopoly.[83] The intent required here is not specific intent as required in attempting to monopolize[84] but can be shown by proving that Section 1 offenses have been committed.[85] As was already discussed the State System has been guilty of several Section 1 offenses including price fixing, selling below cost, tying, and possibly market sharing. The general intent necessary for the offense of monopolization can also be proven by showing that the State Board took actions which contributed to their monopoly power. By proving that the Board took actions which increased its power and by using the maxim that a man intends the necessary consequences of his acts, sufficient general intent can be shown.[36] Since the State Board has taken actions-such as continuing to expand while other schools lost students-which implement their power their intent can readily be established.

Although this paper only set out to show a prima facie case of antitrust violations against the State System there is one defense which is so often used that a word should be said about it. This defense to the charge of monopolization is that the monopoly was thrust upon the defendant. The courts have given some examples of thrust upon defenses, "The defendant may escape liability if it bears the burden of proving that it owes its monopoly solely to superior skill, superior products, natural advantages, economic or technological efficiency."[87] The problem of this thrust upon defense is obviated by stating the prima facie case in terms of "the willful acquisation or maintenance of that power" as was done above; it prevents the defense from arguing the thrust upon defense since it will already have been shown that they used illegal activities to acquire or maintain their power. In the Grinnell case the District Court contended that the thrust upon case "is the highly exceptional case, a rara avis more often found in academic groves than in the thickets of business."[88]

A monopoly can also be built up by way of a combination which follows the same rules as a monopoly resulting from internal growth. The rule has been laid down that "a correct interpretation of the statute ... makes it the crime of monopolization, under Section 2 of the Sherman Act, for parties ... to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition."[89] The question of combination or conspiracy was discussed above and nothing more need be said here. Once a combination or conspiracy has been

proven the question of intent will have been dealt with and the thrust upon defense will not be viable.[90]

2) Attempt or Conspire to Monopolize

The last two offenses under Section 2 of the Sherman Act are to attempt to monopolize and to conspire to monopolize. These offenses are separate from monopolization and no showing is required that monopoly power was ever attained.[91] As with most cases of attempt or conspiracy to commit a substantive crime specific intent is required.[92] Specific intent means more than the general intent required for a monopolization offense and when the charge is conspiracy proof of intent will merge with proof of the conspiracy.[93] In the case of an attempt to monopolize specific intent can be shown through such evidence as documents, industrial background, or a course of conduct.[94]

There is some question as to whether it is necessary to define a market when the charge is attempting or conspiring to monopolize. In Lessig v. Tidewater Oil Co.[95] the court flatly stated that "when the charge is attempt (or conspiracy) to monopolize ... the relevant market is not an issue." The Supreme Court has not directly ruled on this statement although in a dictum in one case the Court said "to establish monopolization or attempt to monopolize a part of trade or commerce under Section 2 of the Sherman Act, it would be necessary to appraise the exclusionary power ... in terms of the relevant market for the product involved."[96] Apparently market definition is still part of the prima facie case of an attempt or conspiracy to monopolize. Since the market has been discussed above it will not be dealt with here.

VI. The Clayton Act

Price Discrimination. Price discrimination under the Clayton Act has been defined as "merely a price difference."[97] In order to establish price discrimination between purchaser in violation of this section, there must be actual sales at two different prices to two different actual buyers.[98] It is clear that by charging out-of-state tuition rates the State System is engaging in price discrimination. Also the State System engages in price discrimination by charging different graduate and undergraduate tuition rates in cases where some of the same courses are taken. The Clayton Act requires the commodities upon which a claim of price discrimination is founded by "of like grade and quality."[99] The State Board offers the identical product to out-of-state students at a higher rate than charged to in-state students so the question of like grade and quality will not pose a problem here.

The Clayton Act does not make every price discrimination illegal but is restricted to certain classes of price discrimination. Before it can be said that the State Board has violated the Clayton Act it must be shown that:[100]

1) the State Board is a person
2) higher education is a commodity
3) purchases involved in such discrimination are in commerce
4) the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition

1) Person

A person is defined in 15U.S.C.12 as "including corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country." It is clear that if the State Board was not a state agency it would certainly be a person within the meaning of the antitrust laws. The only question which must be resolved is whether this state affiliation causes the State Board to cease to be a person. The Supreme Court has pointed out that in construing the word person simple rules of construction are not enough but resort must be made to the purpose of the act, the subject matter, the context, and the legislative history.[101] Such a study has since been made by the Supreme Court when they found a state to be a person within the meaning of the antitrust for purposes of a private suit.[102] The Court pointed out that there is no reason to suppose that Congress meant to leave the states without any antitrust remedy. Since the word person is construed to be used with the same meaning throughout the act[103] it is clear that the state could also be a person subject to suit for antitrust violation.[104] The state affiliation question makes no difference here and since the State Board has the power to "institute, maintain, and perticipate in suits"[105] there is no exemption for the State System here. It should be noted that 15 U.S.C.13c creates a specific exemption for schools and other institutions to the price discrimination portion of the Clayton Act for the purchase of supplies. No mention is made of an exemption for any other purposes.

2) Commodity

The word commodity has not been subjected to much judicial review but it has been held that commodity "must be given its usual and natural meaning."[106] Some of the usual meanings given to commodity include all things possessing attributes of tangible existance,[107] an article of movable or personal property,[108] that which affords convenience or advantage,[109] or any subject of commerce.[110] A college education is something which is probably advantageous, can be sold and moved, and as mentioned above is an object of commerce.

3) Commerce

The fact that education is commerce has already been discussed and it has already been pointed out that the Clayton Act holds to a more narrow regulation of interstate commerce. Since the price discrimination takes place precisely against those people who

cross state lines that is no problem in saying that the commerce affected by the price discrimination is interstate.[111]

4) Lessen Competition

Proof of a price discrimination alone will not make out a prima facie case under this section of the Clayton Act.[112] The statute provides for proof of some damage to some level of competition.[113] The price discrimination practiced by the state has its greatest effect on the schools who are in competition with the State System so the primary level of competition is the one under consideration. The courts examine the economic situation and declare a price discrimination a violation if it is reasonably probably that the discrimination will have a substantial effect on competition.[114] The emphasis here should be on the vigor of competition rather than the hardship of individual institutions.[115] The courts have always ruled that predatory below cost pricing will support a finding of competitive injury.[116] It should be pointed out here that although the members of the State Board probably do not wish to harm competition by engaging in price discrimination, their good motives are no defense to an antitrust claim.[117] The courts are slow to infer injury here and usually demand some proof of market conditions.

Tying. Tying has already been discussed as a violation of the Sherman Act and it is also a violation of the Clayton Act. The wording of the section of the Clayton Act prohibiting tying is very similar to the wording in the section of the Clayton Act on price discrimination. The question of whether the State Board is a person and whether education is a commodity arise under this section but are resolved by the discussion in the last chapter. In addition under this section it must be shown that the State System or the plaintiff in a case against the State System are engaged in trade which is interstate commerce.

After proof has been given that a product has been tied, according to statute some proof must be made that competition has been substantially lessened or that a monopoly is tending to be created. This proof can be made directly by showing market conditions or by simpler methods which the courts have established. Tying is considered a per se offense under the Sherman Act and it has been regarded equally as harshly under the Clayton Act. The test given for determining lessening of competition is stated as, "where the seller enjoys a monopolistic position in the market for the tying product, or if a substantial volume of commerce in the tied product is restrained ... the requisite potential lessening of competition is inferred."[118] This test of illegality has been made even easier by changing the requirement of monopoly power to "sufficient economic power" to produce "an appreciable restraint."[119] Since the State System has a virtual monopoly position in education as mentioned before and since the tying amounts to about

$50 per student per quarter the requisite competitive injury should be inferred.[120] Also competitive injury can be inferred simply by showing that an appreciable amount of commerce has been tied.[121]

VII. Federal Trade Commission Act

The Federal Trade Commission Act and the Clayton Act were passed in 1914 and were designed to supplement the general prohibitions of the Sherman Act. The Clayton Act was aimed at specific practices thought to be commonly used to gain monopoly power while the phrase "unfair methods of competition" in the Federal Trade Commission Act was left undefined in order to create flexibility and elasticity in interpretation and to give the Commission broad powers to curb anticompetitive practices.[122] Violations of either the Sherman or Clayton Act have been held to be violations of the Federal Trade Commission Act.[123] Since the Federal Trade Commission Act is intended to be supplemental the courts have held that actions which fall short of being Sherman or Clayton Act offenses are prohibited by the Federal Trade Commission Act.[124] It has been held that lack of a combination or conspiracy necessary for a Section 1 Sherman Act offense will not defeat an action under the Federal Trade Commission Act.[125] Individual or concerted conduct which falls short of being a Sherman Act violation may as a matter of law constitute an unfair method of competition.[126] Arrangements similar to tying agreements have been held to be violations of the Federal Trade Commission Act since they run counter to the public policy proclaimed in the federal antitrust laws.[127]

The analysis in the sections on the Sherman and Clayton Acts has shown that the State System is guilty of violating the substantive portions of the antitrust laws. The Federal Trade Commission Act was designed to deal with situations in which the spirit of the antitrust laws was being violated but technicalities prevented prosecution. The Commission is supposed to determine for itself what economic effects are sufficient to produce an unfair method of competition.[128] Enforcement of the Federal Trade Commission Act is available only through Commission action and the commission must act only when it finds action to be in the public interest.[129] The consideration of public interest weighs strongly in any Commission action since it is both a necessary and can be a sufficient reason for finding a violation of the Federal Trade Commission Act.[130]

Conclusion

The forgoing analysis has presented the main arguments which would be present in any antitrust action against the State System. A court decision finding the State System in violation of antitrust law would surely be a large step but one which is not without a firm foundation.

The State System is clearly in violation of the substantive portions of the antitrust law even if technicalities prevented a successful suit. The appropriate response to this study is not to look for loopholes for the State System but through legislative action to resolve the obvious conflicts between the State System as it now stands and the policies behind the antitrust laws.

FOOTNOTES

[1]State Bd. of Ins. V. Todd Shipyards Corp., 370 U. S. 451 (1962); Bibb v. Navajo Freight Lines Inc., 359 U. S. 520 (1959)

[2]O.R.S. 646.010-646.180 (1971)

[3]Angle v. Chicago, St. Paul, Minneapolis, & Omaha Ry. Co. 151 U. S. 1 (1893)

[4]Pierce v. Society of Sisters, 268 U. S. 510 (1925)

[5]Katzenbach v. Mc Clung, 379 U. S. 294 (1964)

[6]State of New York v. United States, 326 U. S. 572 (1964)

[7]Board of Trustees of Illinois v. United States, 289 U. S. 48 (1932)

[8]Adams Express Co. v. Croninger, 226 U. S. 491 (1913); Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U. S. 498 (1942)

[9]United States v. State of California, 297 U. S. 175 (1936)

[10]Case v. Bowles, 327 U. S. 92 (1946) in which the court found that land owned by a public board of education was subject to price controls.

[11]317 U. S. 341 (1943)

[12]Id. at 346

[13]Id. at 350-51

[14]Id. at 351; see also Northern Securities Co. v. United States, 193 U. S. 197,332,344-7 (1904)

[15]Id. at 351; see also Union Pacific R. Co. v. United States, 313 U. S. 450,464 (1941)

[16]Actions found unreasonable: Bale v. Glasgow Tobacco Bd. of Trade, 339 F. 2d 281 (6th cir. 1964); American Fed. of Growers v. Neal, 183 F.2d 869 (4th cir. 1950); actions found reasonable: Asheville Tobacco Bd. of Trade v. FTC, 263 F.2d 502 (4th cir. 1959); Winn Ave. Warehouse v. Winchester Tobacco Warehouse, 341 F.2d 287 (6th cir. 1965)

[17]Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th cir. 1966), Cett. denied 385 U. S. 930 (1966)

[18]Harman v. Valley Nat'l Bank, 339 F.2d 564 (9th cir. 1964)

[19]E.W. Wiggins Airways Inc. v. Massachusettes Port Authority, 362 F.2d 52 (1st cir. 1966)

[20]Parmlee Transp. Co. v. Keeshin, 292 F.2d 794 (7th cir. 1961)

[21]George P. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25,30 (1st cir. 1970)

[22]Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109,1111-2 (W.D. Pa. 1969); Norman's on the Waterfront, Inc. v. Wheateley, 444 F.2d 1011,1014-18 (3rd cir. 1971)

[23]424 F.2d 25,30 (1st cir. 1970)

[24]See Wiggins Airways Inc. v. Massachusettes Port Authority, 362 F.2d 52 (1st cir. 1966)

[25]Schenley Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n., 272 F.Supp. 872 (D.N.J. 1967)

[26]Northern Securities Co. v. United States, 193 U.S. 197, 347-50 (1904); Travelers Ins. Co. v. Blue Cross, 298 F. Supp. 1109 (W.D. Pa. 1969); Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F. 2d 502 (4th cir. 1959)

[27]Floride Avocado Growers v. Paul, 373 U.S. 132 (1962)

[28]Woods Exploration & Pro. Co. v. Aluminum Co. of America, 438 F.2d 1386 (1971)

[29]444 F.2d 931, (D.D.C. 1971)

[30]Id. at 936

[31]Brown v. Parker, 39 F.Supp. 895 (1941)

[32]American Bar Association, Antitrust Developments 1955-1968, Chicago, 1968, p. 215 (Hereinafter A.B.A.)

[33]American Medical Ass'n. v. United States, 317 U. S. 519 (1943); United States v. Schubert, 348 U. S. 222 (1955)

[34]Marjorie Webster Junior College v. Middle States 302 F. Supp. 459 (D.D.C. 1969)

[35]Id at 465

[36]Marjorie Webster Junior College v. Middle States, 432 F.2d 650, 652 (1970)

[37]Id. at 653

[38]Page v. Work, 290 F.2d 323 (9th cir. 1961); United States v. Southeastern Underwriters Assn., 322 U. S. 533 (1944)

[39]Case v. Bowles, 327 U. S. 92 (1946)

[40]Webster v. Middle States, 302 F.Supp. 459,465 (1969); American Medical Ass'n. v. United States, 317 U. S. 519, 528, 529 (1943)

[41]Progress Tailoring Co. v. FTC, 153 F.2d 103 (7th cir. 1946)

[42]State of Maryland v. Wirtz, 269 F.Supp. 826 (1967), affd. 392 U. S. 183

[43]United States v. Wrightwood Dairy Co., 315 U. S. 110 (1942); Burke v. Ford 389 U. S. 320 (1967); United States v. Painters Dist. Council No. 14, 44 F.2d 58 (D.C. Ill. 1930)

[44]Sears, Roebuck & Co. v. Blade, 110 F.Supp. 96 (D.C. Cal. 1953); Meyers v. Shell Oil, 96 F.Supp. 670 (D.C. Cal. 1951)

[45]State of Maryland v. Wirtz, 269 F.Supp. 826 (1967)

[46]Report of the Attorney General's National Committee to Study the Antitrust Laws, 1955, p. 12 (Hereinafter Att. Gen.)

[47]Lawton v. Loewe, 290 F.2d 721 (1913)

[48]Paramount Pictures v. United Motion Picture Theatre Owners, 93 F. 2d 714 (1938)

[49]United States v. American Column & Lumber Co. 257 U. S. 377 (1920)

[50]United States v. Sealy, Inc., 388 U. S. 350 (1967)

[51]A.B.A. p. 20

[52]Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U. S. 211,215 (1951)

[53]Att. Gen. p. 34

[54]Rayco Mfg. Co. v. Dunn, 234 F.Supp. 593 (N.D. Ill. 1964); Sunkist Growers v. Winkler & Smith 370 U. S. 19 (1962)

[55]Perma Life Mufflers, Inc. v. International Parts Corp., 392 U. S. 134 (1968)

[56]Jos. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, L.T.D., 416 F.2d 71 (9th cir. 1969)

[57]A.B.A. p. 38

[58]Id. at 39

[59]United States v. Grinnell Corp. 384 U. S. 563 (1966)

[60]United States v. United Shoe Machine Corp. 110 F.Supp 95 (D.C. Mass. 1953), affd. per curium 347 U. S. 521 (1954)

[61]Standard Oil of Cal. v. United States. 337 U. S. 293 (1949)

[62]Indiana Farmers Guide Pub. Co. v. Prarie Farmers Pub. Co., 293 U. S. 268 (1934)

[63]United States v. Yellow Cab, 232 U. S. 218 (1947)

[64]Indiana Farmers Guide Pub. Co. v. Prarie Farmer Pub. Co., 293 U. S. 268 (1934)

[65]Board of Trade v. United States, 147 F.2d 93 (1944)

[66]Wish, John D., Cooke, Romney W., & Maltby, Gregory P., "W(H)ither the Private College" unpublished, Consumer Rights Research Center, Eugene, Ore. Sept. 1971

[67]United States v. Trenton Potteries Co., 273 U. S. 392 (1927)

[68]American Tobacco v. United States, 147 F.2d 93 (1944)

[69]Ring v. Spina, 148 F.2d 647 (1945)

[70]United States v. Trenton Potteries, 273 U. S. 392, 396-98 (1927)

[71]Brown Shoe Co. v. United States, 370 U. S. 294, 330 (1962)

[72]Northern Pac. Py. v. United States, 356 U. S. 1 (1958)

[73]White Motor Co. v. United States, 372 U. S. 253 (1963)

[74]Att. Gen. at 43

[75]United States v. Grinnell Corp., 384 U. S. 563 (1966)

[76]Indiana Farmer's Guide Pub. Co. v. Prarie Farmer Pub. Co., 293 U. S. 268 (1934)

[77]United States v. Addeston Pipe & Steel Co., 175 U. S. 211 (1899)

[78]A.B.A. at 31

[79]United States v. E.I. du Pont de Nemours & Co., 351 U. S. 377 (1956)

[80]International Boxing Club v. United States, 358 U. S. 242 (1959)

[81]United States v. Grinnell, 384 U. S. 563 (1966)

[82]United States v. Grinnell, 236 F.Supp. 234,257 (1966)

[83]United States v. Griffith, 334 U. S. 100 (1948)

[84]American Tobacco Co. v. United States, 147 F.2d 93 (1944)

[85]Att. Gen. at 56

[86]United States v. Aluminum Co. of America, 148 F.2d 416 (2d cir. 1945)

[87]United States v. United Shoe Machinery Corp., 110 F.Supp. 295 (D. Mass. 1953)

[88]United States v. Grinnell Corp. 236 F.Supp. 244,248 (D. R.I. 1964)

[89]American Tobacco Co. v. United States, 382 U. S. 781 (1946)

[90]Att. Gen. at 61-3

[91]United States v. Griffith, 334 U. S. 100,107 (1948) conspiracy; United States v. Columbia Steel Co., 334 U.S.495,531 (1948) attempt to monopolize; violation may be shown even though no restraint unreasonable under Section 1 is effected

[92]Swift & Co. v. United States, 276 U. S. 311 (1928)

[93]United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d cir. 1961)

[94]Kansas City Stor. Co. v. United States, 240 F.2d 643 (8th cir. 1957)

[95]327 F.2d 459 (9th cir. 1964)

[96]Walker Process Equipment, Inc. v. Food Mech. & Chem. Corp., 382 U. S. 172 (1965)

[97]FTC v. Anheuser-Busch Inc., 363 U. S. 536 (1960)

[98]A. J. Goodman & Son v. United Lacquer Mfg. Corp., 81 F.Supp. 890 (D. Mass 1949)

[99]15 U.S.C. 13

[100] 15 U.S.C. 13

[101] United States v. Cooper Corp., 312 U. S. 600,605 (1941)

[102] Georgia v. Evans, 316 U. S. 159 (1942); State of Georgia v. Pa. R. Co. 324 U. S. 875 (1945)

[103] United States v. Cooper corp., 312 U. S. 600,606 (1941)

[104] Georgia v. Evans, 316 U. S. 159,163 (1942)

[105] O.R.S. 351.060 (5) (1971)

[106] United States v. Investors Diversified Services, 102 F.Supp. 645 (D. Minn. 1951)

[107] Burns v. Donohue, 79 F. Supp. 107,108 (D.N.J. 1948)

[108] Group Health Co-op of Puget Sound v. King County Medical Soc., 237 P.2d 737,764 (1952)

[109] McKeon v. Wolf, 77 Ill. App. 325

[110] Eastman Kodak Co. v. Home Utilities Co. 234 F.2d 766,772 (4th cir. 1956)

[111] Meyers v. Shell Oil, 96 F.Supp. 670 (D. Cal. 1951)

[112] Heads' Find Bread Co. v. Moore 208 F.2d 777 (10th cir. 1953)

[113] United States v. E.I. du Pont De Nemours Co., 118 F. Supp. 41, 231 (D. Del. 1953)

[114] Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786,789 (7th cir. 1951)

[115] Italian Ice Cream Co. v. Ardens Farms Co., 104 F.Supp. 796, 801 (S.D. Cal. 1952)

[116] Foster Mfg. Co. v. FTC, 335 F.2d 47 (1st cir. 1964); Utah Pie Co. v. Continental Baking Co., 386 U. S. 685 (1967)

[117] Paramount Famous Lasky Corp. v. United States, 282 U. S. 30 (1930)

[118] Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 608-9 (1953)

[119] Northern Pacific Railway Co. v. United States, 356 U. S. 1,11 (1958)

[120] United States v. Loew's Inc., 371 U. S. 38 (1962)

[121]Fortner Enterprises, Inc. v. United States Steel Corp. 394 U. S. 495 (1969)

[122]A.B.A. at 252; FTC v. Motion Picture Advertising Service co., 344 U. S. 392 (1953)

[123]Sherman, FTC v. Cement Institute, 333 U. S. 683 (1948); tying, Times-Picayune Pub. Co. v. United States, 345 U. S. 594 (1953); Price Discrimination, American News Co. v. FTC, 300 F.2d 104 (2nd cir. 1952)

[124]Fashion Originators' Guild v. FTC, 312 U. S. 457,463 (1940)

[125]FTC v. Cement Institute, 333 U. S. 683,721 (1948)

[126]Id. at 708

[127]Atlantic Refining Co. v. FTC, 381 U. S. 357 (1965)

[128]Beech-Nut Packing Co. v. FTC, 264 F. 885 (1920), revd on other grounds 257 U. S. 441

[129]15 U.S.C. 45

[130]Rothschild v. FTC, 200 F.2d 39 (7th cir. 1953), cert. denied 345 U. S. 941

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THE RESOURCES DEVELOPMENT INTERNSHIP PROGRAM

The preceding report was completed by a WICHE intern during the summer of 1972. This intern's project was part of the Resources Development Internship Program administered by the Western Interstate Commission for Higher Education (WICHE).

The purpose of the internship program is to bring organizations involved in community and economic development, environmental problems and the humanities together with institutions of higher education and their students in the West for the benefit of all.

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